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Clerk

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1905.

No. 248.

THOMAS H. HULBERT,
Plaintiff in Error,
vs.
THE CITY OF CHICAGO,
Defendant in Error

Error to Supreme Court of Illinois.

BRIEF FOR DEFENDANT IN ERROR.

JAMES HAMILTON LEWIS,
CORPORATION COUNSEL,
ATTORNEY FOR DEFENDANT IN ERROR.

CHARLES H. MITCHELL,
FRANK JOHNSTON, Jr.,
OF COUNSEL.

BARNARD & MILLER, PRINTERS, CHICAGO

No. 19,736.

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STATEMENT.

The facts in this case, as stated in the brief of counsel for the plaintiff in error, are substantially correct.

There are only two questions which counsel seeks to present for review by this court, and they are neither new nor difficult, but are controlled entirely by the principles announced in repeated decisions of this court. They are thus respectively stated by counsel on page 18 of his brief:

> 1. "The act entitled 'An Act Concerning Local Improvements,' passed June 14, 1897, and amendments thereto, is contrary to section 2, article 2 and section 9, article 9 of the Constitution of Illinois.
>
> "The Board of Local Improvements is not a municipal corporation, and it has no authority to make special assessments."

2. "Sections 42 and 86 of said act are unconstitutional and void because they interfere with the right of contract by fixing the rate of interest on assessments and improvement bonds at five per cent."

The answers which we offer in reply to these propositions are as follows:

Brief of points and authorities for defendant in error.

I.

THE FIRST CONTENTION OF COUNSEL FOR PLAINTIFF IN ERROR THAT THE LOCAL IMPROVEMENT ACT OF ILLINOIS OF JUNE 14, 1897, IS IN VIOLATION OF SECTION 9 OF ARTICLE 9 OF THE CONSTITUTION OF ILLINOIS IN THAT IT ATTEMPTS TO CONFER ON THE BOARD OF LOCAL IMPROVEMENTS THE POWERS WHICH THE SAID SECTION OF THE CONSTITUTION PROVIDES SHALL BE VESTED IN THE CORPORATE AUTHORITIES OF THE MUNICIPALITY, AND THAT THE BOARD OF LOCAL IMPROVEMENTS IS NOT A CORPORATE AUTHORITY CANNOT BE REVIEWED BY THIS COURT FOR THE REASON THAT THIS QUESTION WAS NOT DECIDED NOR EVEN NOTICED IN THE OPINION OF THE SUPREME COURT OF ILLINOIS, AND THE RECORD DOES NOT SHOW THAT IT WAS CALLED TO THE ATTENTION OF THAT COURT.

The proposition must be regarded as settled that in order to give this court the power to re-examine the judgment of the State court, the title, right, privilege or immunity must be specially set up or claimed at the proper time and in the proper way,

and that the right on which the party relies must have been called to the attention of the court in some proper way, and the decision of the court must have been against the right claimed.

Oxley Stave Co. v. *Butler Co.*, 166 U. S., 648.

Sayward v. *Denny*, 158 U. S., 180-183-184-186.

Levy v. *Sup. Ct. of San Francisco*, 167 U. S., 175, 177.

C. & N. W. Ry. Co. v. *Chicago*, 164 U. S., 454, 457.

Ansbro v. *U. S.*, 159 U. S., 695, 698.

Hoyt v. *Shelden*, 1 Black, 518, 521.

Keokuk & Hamilton Bridge Co. v. *Illinois*, 175 U. S., 626.

Although the State court may have decided a Federal question, it must appear that the particular Federal question sought to be raised here was also decided.

Capital City Dairy Co. v. *Ohio*, 183 U. S., 238, 248.

Chapin v. *Fye*, 179 U. S., 127.

The fact that the opinion of the State court makes no reference to the particular question sought to be presented in this court, may be considered in determining whether the question was called to the attention of the state court.

Oxley Stave Co. v. *Butler County*, 166 U. S., 648, 653, 655.

Kipley v. *Illinois*, 170 U. S., 182, 186.

C. & N. W. Ry. Co. v. *Chicago*, 164 U. S., 454, 457.

Mich. Sugar Co. v. *Michigan*, 185 U. S., 112, 113.

N. Y. Cen. R. R. Co. v. *New York*, 186 U. S., 269, 273.

This court will recognize and be governed by the rule of practice in a State court prescribing the requirements to be observed in order to save a question for review in that court.

Erie Railroad Co. v. *Purdy*, 185 U. S., 148, 153.

According to the well settled rule of practice in the Supreme Court of Illinois, every error must be specifically pointed out in the assignments of error, and an error not assigned is not open to review.

Berry v. *City of Chicago*, 192 Ill., 154, 155.

Skakel v. *People*, 188 Ill., 291, 294.

Gibler v. *City of Mattoon*, 167 Ill., 18, 24.

The very error relied upon should be definitely and clearly presented, and the court not compelled to go beyond the assignment itself to learn what the question is.

Stanley v. *Chi. Tr. & Sav. Bank*, 61 Ill. App., 257, 262.

Errors assigned, but not noticed or relied on in the brief and argument of counsel, will be regarded as waived or abandoned.

Lewis v. *King*, 180 Ill., 259, 266.

Dorn v. *Ross*, 177 Ill., 225, 228.

Keyes v. *Kimmell*, 186 Ill., 109, 114.

Harris v. *Shebek*, 151 Ill., 287, 294.

II.

EVEN THOUGH IT SHOULD BE HELD THAT THE FIRST CONTENTION OF COUNSEL THAT THE LOCAL IMPROVEMENT ACT OF ILLINOIS OF JUNE 14, 1897, IS UNCONSTITUTIONAL, BECAUSE IT CONFERS POWERS ON THE BOARD OF LOCAL IMPROVEMENTS WHICH THE CONSTITUTION PROVIDES SHALL BE VESTED IN CORPORATE AUTHORITIES AND THAT THE BOARD OF LOCAL IMPROVEMENTS ARE NOT CORPORATE AUTHORITIES, WAS SUFFICIENTLY SET UP OR CLAIMED IN THE SUPREME COURT OF ILLINOIS TO AUTHORIZE THIS COURT TO REVIEW IT, YET WE MAINTAIN THAT THE PROPOSITION CONTENDED FOR BY COUNSEL DOES NOT INVOLVE A FEDERAL, BUT ONLY A LOCAL QUESTION, AND, FOR THAT REASON, CANNOT BE CONSIDERED BY THIS COURT.

The United States Supreme Court has no power to review a State statute on the ground solely that it is repugnant to the state constitution.

Kipley v. *Illinois*, 170 U. S., 182, 186.

Miller v. *Cornwall R. R. Co.*, 168 U. S., 131, 134.

A special assessment is levied under the taxing power of a state, and is a species of taxation.

French v. *Barber Asphalt Pav. Co.*, 181 U. S., 324, 343, 344.

C. & A. R. R. Co. v. *City of Joliet*, 153 Ill., 649.

County of Adams v. *City of Quincy*, 130 Ill., 566.

It is not the province of this court ordinarily to interfere with the policy of the revenue laws of the

state or with statutes providing for making local improvements by special assessment.

French v. *Barber Asphalt Pav. Co.*, 181 U. S., 324.

Witherspoon v. *Duncam*, 4 Wall., 210, 217.

Williams v. *Supervisors of Albany*, 122 U. S., 154, 164.

Shaefer v. *Werling*, 188 U. S., 516, 517.

It has been held by this court that the Supreme Court of Illinois, decided a local, and not a federal, question when it held that it was competent, on a new assessment, to determine the question of benefits from the proof, even though in so doing a different result was reached than that which had been arrived at when the former assessment, which had been set aside, was made.

Lombard v. *West Chi. Park Commrs.*, 181 U. S., 33, 34.

In the apportionment of assessments for improvements "due process of law" is afforded to the taxpayer if he is given an opportunity to be heard before the body making the assessment; and, so far as the Federal statute is concerned, the State legislature may provide that such hearing shall be conclusive.

Hibben v. *Smith*, 191 U. S., 310, 322, 323.

If a taxpayer be given an opportunity to test the validity of the tax at any time before it is made final, where the proceedings for review take place before a board having a quasi judicial character, or before a tribunal provided by the State for the purpose of determining such questions, due process of law is not denied.

Hodge v. *Muscatine County*, 196 U. S., 276, 281.

The Federal courts ought not to interfere when what is complained of is the enforcement of a state statute applicable to all persons in like circumstances and conditions; but only when there is some abuse of law amounting to confiscation of property, or deprivation of personal rights.

French v. *Barber Asphalt Pav. Co.*, 181 U. S., 324.

A state statute authorizing the paving of streets and the charging of the cost therefor on the abutting property according to frontage, without reference to any benefits to the property, is held to be an orderly procedure under a scheme of local improvements prescribed by the legislature and approved by the courts of the State as consistent with constitutional principles.

French v. *Barber Asphalt Paving Co.*, 181 U. S., 324, 326, 346.

III.

THE PRECISE QUESTION INVOLVED IN THE FIRST CONTENTION OF COUNSEL FOR PLAINTIFF IN ERROR, THAT THE LOCAL IMPROVEMENT ACT OF ILLINOIS OF JUNE 14, 1897, IS UNCONSTITUTIONAL, BECAUSE IT CONFERS ON THE BOARD OF LOCAL IMPROVEMENTS POWERS WHICH CAN ONLY BE VESTED IN CORPORATE AUTHORITIES AND THAT THE BOARD OF LOCAL IMPROVEMENTS ARE NOT CORPORATE AUTHORITIES, WAS DECIDED ADVERSELY TO COUNSEL'S CONTENTION BY THE SUPREME COURT OF ILLINOIS IN THE CASE OF GIVENS V. CITY OF CHICAGO, 188 ILL., 348; AND WE MAINTAIN THAT THAT DECISION OF THE SUPREME COURT OF ILLINOIS, WHICH UPHOLDS THE VALIDITY OF THE STATUTE COMPLAINED OF, IS CONCLUSIVE UPON THIS COURT.

The decision of the highest court of a state that an act of the legislature is not in conflict with the provision of the state constitution is conclusive on the Federal courts, except where the Federal constitution and laws are concerned.

22 Am. & Eng. Ency. of Pl. & Pr., 326.

The decision of the highest court of a State sustaining the validity of a statute is conclusive in this court as to any question of conflict between it and the state constitution.

Merchants' and Manufacturers' Bank v. *Penna.*, 167 U. S., 461.

Forsyth v. *Hammond*, 166 U. S., 506, 518.

The construction placed by the highest court of a state on a statute providing for paving streets and distributing the assessment therefor, is conclusive upon this court.

Schaefer v. *Werling*, 188 U. S., 516, 517.

IV.

THE CONSTRUCTION OF SECTIONS 42 AND 86 OF THE LOCAL IMPROVEMENT ACT OF ILLINOIS, OF JUNE 14, 1897, WHICH COUNSEL FOR PLAINTIFF IN ERROR CONTENDS IN HIS SECOND POINT ARE UNCONSTITUTIONAL "BECAUSE THEY INTERFERE WITH THE RIGHT OF CONTRACT BY FIXING THE RATE OF INTEREST ON ASSESSMENTS AND IMPROVEMENT BONDS AT FIVE PER CENT.," INVOLVES A LOCAL, AND NOT A FEDERAL QUESTION; AND THE INTERPRETATION PLACED ON SAID SECTIONS BY THE SUPREME COURT OF ILLINOIS IS, THEREFORE, BINDING ON THIS COURT.

Sections 42 and 86 of the Local Improvement Act fixing the rate of interest upon deferred installments of a special assessment, and the bonds issued therefor, at 5 per cent., are not unconstitutional, as depriving property owners of property without due process of law by precluding the city from negotiating for a lower rate of interest.

Hulbert v. *City of Chicago*, 213 Ill., 452, 455, 456 (decided December 22, 1904; rehearing denied February 9, 1905).

(This is the case now before the court.)

The statute fixing the rate of interest on special assessment installments and bonds at 5 per cent. is not unconstitutional, as precluding the right of property owners to contract, through the city, for a less rate.

Gage et al. v. *City of Chicago*, 216 Ill., 107, 109, 110 (decided June 23, 1905).

V.

SECTIONS 42 AND 86 OF THE LOCAL IMPROVEMENT ACT OF ILLINOIS, OF JUNE 14, 1897, WHICH COUNSEL FOR PLAINTIFF IN ERROR IN HIS SECOND CONTENTION CLAIMS ARE UNCONSTITUTIONAL "BECAUSE THEY INTERFERE WITH THE RIGHT OF CONTRACT BY FIXING THE RATE OF INTEREST ON ASSESSMENTS AND IMPROVEMENT BONDS AT FIVE PER CENT." CONFER NO CONTRACTUAL RIGHTS WHATEVER ON A PROPERTY OWNER, AND, THEREFORE, NECESSARILY DO NOT IMPAIR OR ABRIDGE ANY SUCH RIGHTS. BUT WE SUBMIT THAT EVEN IF THEY DID CONFER CERTAIN CONTRACTUAL RIGHTS UPON A PROPERTY OWNER, THEY WOULD NOT IMPAIR

SUCH RIGHTS IN PROVIDING FOR A FIXED RATE OF INTEREST ON INSTALLMENTS OF SPECIAL ASSESSMENTS AND SPECIAL ASSESSMENT BONDS.

The construction of local improvements by special assessment is purely and entirely a statutory proceeding; and a property owner posseses no rights whatever in respect thereto independently of statute, but all of his rights in that regard are derived solely from the statute.

There is no special provision in the constitution of Illinois which imposes any restrictions on the power of the legislature in respect to regulating the interest on assessments and special assessment bonds.

Regulating the interest on special assessment bonds or installments of special assessments being purely a statutory proceeding, cannot be held to interfere with or abridge any inherent right of contract guaranteed by that general clause of the constitution, either of the State of Illinois or of the United States, which provides substantially that no person shall be deprived of life, liberty or property without due process of law.

In fixing the rate of interest on improvement bonds or installments of a special assessment, the legislature of Illinois was simply providing one of the steps in the procedure for raising by special assessment the amount of money required for a proposed public improvement; and in the exercise of this taxing power, the Supreme Court of the United States will not ordinarily interfere.

As a general proposition, interest is solely a creature of statute.

Fowler v. *Harts*, 149 Ill., 582, 597.

Insurance Co. v. *Refrigerating Co.*, 162 Ill., 322, 323.

City of Chicago v. *Allcock*, 86 Ill., 384, 385.

I. C. R. R. Co. v. *Cobb, Blaisdell & Co.*, 72 Ill., 148, 152.

ARGUMENT.

As has been stated, only the two following questions are urged by counsel for the plaintiff in error for review by this court:

1. "The act entitled 'An Act Concerning Local Improvements,' passed June 14, 1897, and amendments thereto, is contrary to section 2, article 2, and section 9, article 9, of the Constitution of Illinois.

"The Board of Local Improvements is not a municipal corporation, and it has no authority to make special assessments."

2. "Sections 42 and 86 of said Act are unconstitutional and void, because they interfere with the right of contract by fixing the rate of interest on assessment and improvement bonds at 5 per cent."

It will be observed that counsel for plaintiff in error in stating the questions for the consideration of this court, makes no reference whatever to the Constitution of the United States, but apparently only contends that the constitution of Illinois has been contravened.

It will also be perceived that in his argument, counsel discusses both questions almost entirely in relation to the constitution of Illinois. He makes no attempt to define specifically the way in which the Constitution of the United States is violated. The mere general statements that the plaintiff in error "is deprived of certain rights guaranteed to him by the 14th amendment to the Constitution of the United States" and that "this proceeding

is contrary to the law of the land and in violation of the 14th amendment to the Constitution of the United States" comprise all of the argument of counsel in this respect on both contentions. How the amendment is violated, or what precise right under it plaintiff in error is deprived of, counsel does not point out either in his brief or argument.

Nor do the assignments of error in this court by plaintiff in error (Trans. of Record, p. 38) properly state the questions which counsel desires this court to consider. Some of the assignments allege error on the part of the Supreme Court of Illinois, and others allege error on the part of the County Court of Illinois; but in none is there a specific statement of the Federal questions which counsel is requesting this court to examine.

The following language used by this court in the case of *Davidson* v. *New Orleans*, 96 U. S., 97, 104, we submit, is particularly applicable to this case:

> "There is here abundant evidence that there exists some strange misconception of the scope of this provision as found in the 14th amendment. In fact, it would seem, from the character of many of the cases before us, and the arguments made in them, that the clause under consideration is looked upon as a means of bringing to the test of the decision of this court the abstract opinion of every unsuccessful litigant in a State court, of the justice of the decision against him, and of the merits of the legislation on which such a decision may be founded."

Assuming, however, that the assignments of error in this court of plaintiff in error, properly raise the questions urged for review by counsel for

plaintiff in error, we will discuss those questions in the order in which counsel has stated them.

I.

The first contention of counsel for plaintiff in error, that the Local Improvement Act of Illinois of June 14, 1897, is in violation of Section 9 of Article 9 of the Constitution of Illinois, in that it attempts to confer on the Board of Local Improvements the powers which the said section of the Constitution provides shall be vested in the corporate authorities of the municipality and that the Board of Local Improvements is not a corporate authority, cannot be reviewed by this court, for the reason that this question was not decided nor even noticed in the opinion of the Supreme Court of Illinois, and the record does not show that it was called to the attention of that court.

We submit that the question above stated was not "specially set up or claimed" in the Supreme Court of Illinois (the judgment of which this court is requested to re-examine on this writ of error) in accordance with the decisions of this court construing Section 709 of the Revised Statutes of the United States.

It will be found on an examination of the assignments of error in the Supreme Court of Illinois (Transcript of Record, pp. 28, 29) that there is not a single assignment which expressly raises this

question or properly calls it to the attention of the Supreme Court of Illinois. The only theory on which it could be contended that the question was involved in the assignments of error in that court would be to claim that it was raised impliedly or inferentially by the assignments numbered 1, 2 and 11, which allege respectively, in general terms, (1) that the County Court erred in not sustaining the objections of appellant; (2) that the County Court erred in overruling the objections of appellant; (11) and that the finding of the County Court is contrary to the law and to the evidence.

For the convenience of the court we will here set out the said assignments of error of the plaintiff in error in the Supreme Court of Illinois, as they appear in the Transcript of Record on pages 28 and 29:

"In the Supreme Court of Illinois,
of the October Term, 1904.

Thomas H. Hulbert, *Appellant*,
vs.
The City of Chicago, *Appellee*.

Assignment of Errors.

Now comes the above named appellant, by George W. Wilbur, his attorney, and says that in said record and proceedings there are manifest errors, in this, that is to say:

1. Said County Court erred in not sustaining the objections of appellant, and each thereof.

2. Said County Court erred in overruling the objections of appellant, and each thereof.

3. Said County Court erred in admitting improper evidence on behalf of appellee and over the objections of appellant.

4. Said County Court erred in refusing to receive proper evidence offered on behalf of appellant.

5. Said County Court had no jurisdiction to entertain said proceedings for the reason that the petition and the ordinance which is the basis thereof is not in accordance with the statute, and because said ordinance does not state the nature, character, locality and description of the proposed improvement.

6. Said County Court had no jurisdiction to enter a judgment of confirmation in said proceedings for the reason that the Board of Local Improvements did not adopt a preliminary resolution for the proposed improvement in the manner and form required by law; neither was such alleged resolution transcribed into the records of said board in the manner required by statute. Said resolution as to the time for a public hearing and other jurisdictional matters is not in accordance with the act under which said proceedings were instituted.

7. The court had no jurisdiction to enter a judgment of confirmation herein for the reason that the alleged estimate of the cost of the improvement was not made by the proper officer, and it is not in the form required by law. The officer making the same did not certify that such estimate does not exceed the probable cost of the proposed improvement and the lawful expenses attending the same. Said estimate is in other respects contrary to the statute.

8. Said County Court had no jurisdiction to enter a judgment of confirmation herein because the proceedings before said Board of Local Improvements appearing in the record herein are not in accordance with the statute.

9. The ordinance herein is void because it provides for the collection of interest on the first installment of said assessment.

10. The County Court erred in not finding that the property of appellant was assessed more than its proportionate share of the cost of said improvement, and more than it will be benefited by reason of the construction of the proposed improvement.

11. The finding of the County Court is contrary to the law, and it is also contrary to the evidence.

And for divers other errors appearing in said record and proceedings, appellant prays that said judgment of said County Court as to his property be set aside and held for naught.

Respectfully submitted.

GEORGE W. WILBUR,
Attorney for Appellant."

In their opinion in this case the Supreme Court of Illinois not only did not decide the question under discussion, but did not even refer to it.

It is true that the objections filed in the County Court, the judgment of which was reviewed directly by the Supreme Court of Illinois, claimed a violation of the Constitution of Illinois and of the Fourteenth Amendment to the Constitution of the United States; but as we have stated, the claim was not specifically renewed in the Supreme Court of Illinois, and according to the well settled rule of practice in Illinois, every error must be specifically pointed out in the assignments of error in the Supreme Court before it will be reviewed by that Court; and an error not so set out is not open to review.

Berry v. *City of Chicago*, 192 Ill., 154, 155.
Skakel v. *The People*, 188 Ill., 291, 294.

The very error relied upon should be definitely and clearly presented, and the court should not be compelled to go beyond the assignment itself to learn what the question is.

Stanley v. *Chicago Trust & Sav. Bank*, 61 Ill. App., 257, 262.

And errors assigned, but not noticed or relied on in the brief or argument of counsel, will be regarded as waived or abandoned.

Lewis v. *King*, 180 Ill., 259, 266.
Dorn v. *Ross*, 177 Ill., 225, 228.
Keyes v. *Kimmell*, 186 Ill., 109, 114.
Harris v. *Shebek*, 151 Ill., 287, 294.

In view of the above rule of practice in Illinois, since the opinion of the Supreme Court of Illinois makes no reference whatever to this particular question, the only reasonable conclusion is that it was not called to the attention of the Court; and this presumption is further strengthened by the fact that the Supreme Court of Illinois did consider the second contention of counsel for plaintiff in error, in which it was claimed that a constitutional right of contract was violated by the provision of the Local Improvement Act regulating the rate of interest on improvement bonds. It is true the Supreme Court of Illinois only considered that question in relation to the State Constitution, but the fact that it reviewed that question at all, and did not even remotely refer to the other, strengthens the presumption that the latter was not presented for consideration, but was abandoned.

The rule is so well settled in this court, and has been repeated so often, that a Federal question which was not specifically raised in the assignments of error in the State court, or in some proper way called to the attention of that Court, will not be considered in this Court for the first time, that it is hardly necessary to cite the decisions. A mere statement of the rule is sufficient. However, we will cite

the following authorities, which are directly in point, without quoting from them:

Oxley Stave Co. v. *Butler County*, 166 U. S., 648.

Hoyt v. *Shelden*, 1 Black, 518, 521.

Sayward v. *Denny*, 158 U. S., 180, 183, 184, 186.

Chapin v. *Fye*, 179 U. S., 127.

Keokuk & Ham. Br. Co. v. *Ill.*, 175 U. S., 626.

It has also been expressly held by this court that, although the State court may have decided a Federal question, it must appear that the particular Federal question urged for review by this Court was also decided.

Capital City Dairy Co. v. *Ohio*, 183 U. S., 238, 248.

And in the following decisions the fact that the opinion of the State court made no reference to the particular question sought to be presented in this Court appears to be of controlling importance in determining whether the question was called to the attention of the State court:

Oxley Stave Co. v. *Butler County*, 166 U. S., 648-653-655.

Kipley v. *Illinois*, 170 U. S., 182-186.

C. & N. W. Ry. Co. v. *Chicago*, 164 U. S., 454-457.

Michigan Sugar Co. v. *Michigan*, 185 U. S., 112-113.

New York Central R. R. Co. v. *New York*, 186 U. S., 269-273.

In the case of *Oxley Stave Co.* v. *Butler County*, 166 U. S., 648, 655, *supra*, the court said, in part (pp. 653, 655):

> "Looking into the record, we do not find that any reference was made in the court of original jurisdiction to the Constitution of the United States. Nor can it be inferred from the opinion of the Supreme Court of Missouri that that court was informed by the contention of the parties that any federal right, privilege or immunity was intended to be asserted. For aught that appears the state court proceeded in its determination in the cause without any thought that it was expected to decide a Federal question."

In the case of *Chicago & Northwestern Ry. Co.* v. *Chicago*, 164 U. S., 454-457, *supra*, the court said in part (p. 457):

> "It is assigned in this court for error that the judgment of the court of original jurisdiction had the effect to deprive the railroad company of its property without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States. But the record does not show that the company specially set up or claimed in the state courts, or either of them, any right under the Constitution of the United States. It does not appear that the attention even of the trial court was called to the fact that the company, in any form or for any purpose, invoked the protection of that instrument. Nor does it appear from the record that any Federal right was specially set up or claimed in the Supreme Court of the state. * * * In view of these assignments of error, it is not strange that the Supreme Court of Illinois made no reference in its opinion to the clause of the Constitution of the United States which, in this court for the first time, is invoked to sustain the proposition that the company's property has been taken without due process of law."

In the case of *Michigan Sugar Co.* v. *Michigan*, 185 U. S., 112-113, *supra*, the court said, in part p. 113):

> "The Supreme Court of the state did not refer to the Federal Constitution or consider and decide any Federal question. For aught that appears the court proceeded in its determination of the cause without any thought that it was disposing of such a question."

In the case of *New York Central Railroad Co.* v. *New York*, 186 U. S., 269, 273, *supra*, the court said, in part (p. 273):

> "It is hardly necessary to say that the raising of such a question in the assignments of error in this court is insufficient. Not only was there no Federal question raised in the record, but the appellate division made no allusion to such a question."

It may be that if the question under discussion had been properly raised by the assignments of error in the Supreme Court of Illinois, the mere failure of that Court to dispose of the question would not deprive this Court of the jurisdiction to review it. But we maintain that the record shows that the assignments of error in the Supreme Court of Illinois did not properly present this question for review by the Supreme Court of Illinois, and that the Supreme Court of Illinois did not notice or pass upon it.

We submit that the question under discussion cannot be reviewed by this court.

II.

Even though it should be held that the first contention of counsel that the Local Improvement Act of Illinois of June 14, 1897, is unconstitutional, because it confers powers on the Board of Local Improvements which the Constitution provides shall be vested in corporate authorities, and that the Board of Local Improvements are not corporate authorities, was sufficiently set up or claimed in the Supreme Court of Illinois to authorize this court to review it; yet we maintain that the proposition contended for by counsel does not involve a Federal, but only a local, question, and for that reason cannot be considered by this court.

Assuming that the record in the Supreme Court of Illinois shows that the question under discussion was properly raised in that court (which we deny), we submit that it involves only a local and not a federal question. That part of the Constitution of Illinois which counsel claims is violated by the Local Improvement Act of Illinois of June 14, 1897, is as follows:

> "The General Assembly may vest the corporate authorities of cities, towns and villages with power to make local improvements by special assessment or special taxation of contiguous property, or otherwise."
>
> Section 9, Article 9, Constitution of Illinois.

Under this provision, counsel contends that the

Legislature of Illinois cannot confer power to make local improvements by special assessment or by special taxation of contiguous property or otherwise, upon any municipal officer or officers, or body of officials other than those which are legally known as "corporate authorities." And counsel further contends that the Board of Local Improvements of the City of Chicago are not "corporate authorities" in the sense of this constitutional provision. But we submit that these contentions do not even remotely involve a Federal question. It seems to us, on the authorities, too plain for argument that the question under consideration involves only a local rule of law in respect to the procedure in Illinois for collecting taxes, of which a special assessment is a species, and that the Constitution of the United States is no way drawn in question. Whether the Local Improvement Act, in conferring certain powers, in respect to making local improvements by special assessment, on the Board of Local Improvements violates the provision of the Constitution of Illinois, above cited, is immaterial, in so far as the jurisdiction of this court is concerned. The rule is too well settled to be disputed that the Supreme Court of the United States have no power to review a State statute on the ground solely that it is repugnant to the state Constitution.

Kipley v. *Illinois*, 170 U. S., 182-186.
Miller v. *Cornwall*, 168 U. S., 131, 134.

The rule is equally well settled that it is not the province of this Court to interfere with the policy

of the revenue laws of the State or with the State procedure for the collection of taxes.

French v. *Barber Asphalt Paving Co.*, 181 U. S., 324.

Witherspoon v. *Duncan*, 4 Wall., 210, 217.

Williams v. *Supervisors of Albany*, 122 U. S., 154, 164.

And it certainly will not be denied that a special assessment is levied under the taxing power and is a species of taxation.

French v. *Barber Asphalt Paving Co.*, 181 U. S., 324.

C. & A. R. R. Co. v. *City of Joliet*, 153 Ill., 649.

County of Adams v. *City of Quincy*, 130 Ill., 566.

In the particular cases which we will cite, in which this court has been asked to review state statutes providing for the construction of local improvements by special assessment, although the precise question here involved was not decided, yet we submit that the principles announced, control the present case and sustain our contention that the question is merely a local one in respect to the collection of taxes, in no way involving a federal question.

In the case of *Hibben* v. *Smith*, 191 U. S., 310, 322, 323, where, among other things, it was urged that certain statutory provisions in a special assessment act providing how a board of trustees should be composed were unconstitutional, this court said (p. 323):

"The sole remaining question arises upon the allegations contained in the answer and cross-complaint, that all the members of the board of trustees were residents of the town and tax payers therein and that two members of the board were owners of lots abutting upon the improvement and assessed therefor at the same rate as the others.

"The objection to the tribunal constituted by the legislature of Indiana, which the plaintiff in error makes in this particular instance, is, that it results in making the person a judge in his own case and that hence any judgment of a tribunal thus constituted is absolutely void and may be attacked, as it is attacked in this case, collaterally. It is stated that to impose an assessment, which is the same as a judgment under such circumstances, is to take the lot owners property without due process of law and violates, thereby the Federal Constitution. We think the first objection that all of the members of the board of trustees were residents of and tax payers in the town, is wholly unimportant. We have not the slightest doubt of the power of the legislature of a State, unless hampered by some special constitutional provision, to create a tribunal in a city or town such as the Common Council or Board of Trustees, to make an assessment and that such assessment would be valid notwithstanding the fact that every member of the board was a tax payer of the city or the town. It is a matter of legislative discretion as to how such a board shall be constituted and we hazard nothing in saying that it is quite common throughout the country for the legislatures of the states to create a tribunal for levying assessments for local improvements in a manner precisely like the case in question. It is not at all analogous even in principle to a judge of a court acting in a case in which he is personally interested * * *. The provisions of the 14th amendment

do not cover such an objection as is now under consideration. The general system of procedure for the levying and collection of taxes which is established in this country is, within the meaning of the Constitution due process of law. *Kelly* v. *Pittsburgh*, 104 U. S., 78. A provision made by the legislature of a state in relation to the manner of levying an assessment for a local improvement is within this principle a proceeding for the levying and collection of taxes and unless it be in violation of some particular provision of the federal constitution, it will be upheld in this court. The 14th amendment, it has been held, legitimately operates to extend to the citizens and residents of the states the same protection against arbitrary state legislation, affecting life, liberty and property, as is offered by the 5th amendment against similar legislation by Congress; but that the Federal courts ought not to interfere when what is complained of amounts to the enforcement of the laws of a State applicable to all persons in like circumstances and conditions, and that the Federal courts should not interfere unless there is some abuse of law amounting to confiscation of property or a deprivation of personal rights such as existed in the case of *Norwood* v. *Baker*, 172 U. S., 269.

"These principles have been reiterated in a series of cases reported in the 181 U. S. commencing with *French* v. *Barber Asphalt Paving Co.*, at p. 324 of that volume.

"The facts contained in the objection now under discussion do not in our judgment constitute any violation of the Federal Constitution or result in the taking of the property of the plaintiff in error without due process of law as that term is understood, when used in the Constitution of the United States."

In the case of *French* v. *Barber Asphalt Paving Co.*, 181 U. S., 324, in which a state special assess-

ment act was attacked on the ground that it was in violation of the 14th amendment to the Constitution of the United States, because it authorized the paving of streets and the charging of the cost thereof on abutting property owners according to the frontage, without reference to any benefits to the property on which the charge was made, this court held, among other things, that it was not the intention of the 14th amendment to subvert the systems of the states pertaining to general and special taxation. And after a learned and elaborate review of the cases arising under the provisions of the 5th and 14th amendments to the Constitution of the United States, the court said (pp. 343, 344):

> "We do not deem it necessary to extend this opinion by referring to the many cases in the state courts, in which the principles of the foregoing cases have been approved and applied. It will be sufficient to state the conclusions reached, after a review of the state decisions, by two text writers of high authority for learning and accuracy:
>
> "'The major part of the cost of a local work is sometimes collected by general tax, while a smaller portion is levied upon the estates specially benefited.
>
> "'The major part is sometimes assessed on estates benefited, while the general public is taxed a smaller portion in consideration of a smaller participation in the benefits.
>
> "'The whole cost in other cases is levied on lands in the immediate vicinity of the work.
>
> "'In a constitutional point of view, either of these methods is admissible, and one may sometimes be just and another at other times. In other cases it may be deemed reasonable to make the whole cost a general charge, and levy no special assessment whatever. The question

is legislative, and, like all legislative questions, may be decided erroneously; but it is reasonable to expect that, with such latitude of choice, the tax will be more just and equal than it would be were the legislature required to levy it by one inflexible and arbitrary rule.' Cooley on Taxation, 447.

"'The courts are very generally agreed that the authority to require the property specially benefited to bear the expense of local improvements is a branch of the taxing power, or included within it. * * * Whether the expense of making such improvements shall be paid out of the general treasury, or be assessed upon the abutting or other property specially benefited, and, if in the latter mode, whether the assessment shall be upon all property found to be benefited, or alone upon the abutters, according to frontage or according to the area of their lots, is according to the present weight of authority considered to be a question of legislative expediency.' Dillon's Municipal Corporations, Vol. 2, Sec. 752, 4th Ed."

And, in concluding their opinion, the court said (p. 346):

"What was complained of was an orderly procedure under a scheme of local improvements prescribed by the legislature and approved by the courts of the state as consistent with constitutional principles."

We submit that on the principles announced in the above authorities, particularly that of *French* v. *Barber Asphalt Paving Co., supra,* the question under discussion is not a federal question, but only a local one involving the construction of a state statute for the collection of special assessments; applicable to all persons in like circumstances and conditions; not discriminative between persons or classes

of persons within the municipality; and not violative of the Constitution or any law of the United States.

III.

The precise question involved in the first contention of counsel for plaintiff in error, that the Local Improvement Act of Illinois, of June 14, 1897, is unconstitutional, because it confers on the Board of Local Improvements powers which can only be vested in corporate authorities and that the Board of Local Improvements are not corporate authorities, was decided adversely to counsel's contention by the Supreme Court of Illinois in the case of Givens v. The City of Chicago, 188 Ill., 348, and we maintain that that decision of the Supreme Court of Illinois, which upholds the validity of the statute complained of, is conclusive upon this court.

In the case of *Givens* v. *City of Chicago*, 188 Ill., 348, the precise question was thus stated by the Supreme Court of Illinois (p. 350):

> "The most important objection made, however, and urged upon our attention, is that the act of June 14, 1897, entitled, 'An Act Concerning Local Improvements,' is unconstitutional and void because in conflict, as it is claimed, with Section 9 of Article 9 of the Constitution, which, on this subject, provides: 'The General Assembly may vest the corporate authorities of cities, towns and villages with power to make local improvements by special assessment, or by special taxation or otherwise.'

> "The point made against the statute is that it undertakes to confer upon the Board of Local Improvements the power which the constitution provides shall be vested in the corporate authorities of the municipality, and that such a board is not such corporate authority."

After a carefully considered opinion, the court held, in substance, that the Local Improvement Act of Illinois of June 14, 1897, was not in violation of Section 9 or Article 9 of the Constitution of Illinois in providing for a Board of Local Improvements and permitting certain preliminary proceedings relative to the making of local improvements, to be performed under the authority of said Board, since a duly adopted ordinance by the City Council lies at the foundation of an improvement proceeding, and the Board is not vested with the power to adopt an ordinance.

In their opinion the court said in deciding this point (pp. 350-355):

> "This provision of the constitution is a limitation upon the power of the General Assembly to confer the same power upon any authorities or bodies other than the corporate authorities. (*Connell* v. *People ex rel.*, 107 Ill., 372.) And we have held in numerous cases that the corporate authorities upon whom the power of taxation may be conferred, within the purview of this provision of the constitution, are the authorities of the municipality who are either elected directly by the people to be taxed, or appointed in some mode to which they have given their assent. (*Cornell* v. *People, ex rel., supra; Wetherell* v. *Devine*, 116 Ill., 631; *Snell* v. *City of Chicago*, 133 *id.*, 413.) It seems clear without argument or citation of cases, that the Board of Local Improvements provided for in

the act of authorizing the creation of such board cannot be held to be the corporate authorities of the city or village, but that, as cities and villages are now organized and governed under the general law for the incorporation of cities and villages, their incorporate authorities are the City Council of the cities and the trustees of the villages. But it can be said that the statute in question purports to vest power in the Board of Local Improvements to make such improvements by special assessments, special taxation or otherwise? If it does not, the act is not unconstitutional simply because it provides for the creation of such a board and commits to it certain preliminary work, mainly in the line of ascertaining the facts necessary for the council to know before determining whether or not to provide for the making of the improvement and the levying of the assessment or special tax. An ordinance duly adopted lies at the foundation of the proceeding, and the board is not vested with any power to adopt an ordinance. That, under the statute, could in this case only have been done by the City Council of the City of Chicago. Before enactment of this statute the council might have required much of this preliminary work to be done by one of its committees, and while some of the former powers of the council in this respect have by the act been taken away and conferred on the board, still no power has been conferred on the board which by the constitution could only be vested in the council. It is certainly no violation of the constitution for the legislature to prescribe conditions to be complied with before the corporate authorities can make local improvements at the expense of the property owners. It has never been supposed that the provision applicable to cities of less than 25,000, (now 50,000, as amended), providing that no ordinance for such an improvement shall be adopted unless petitioned for by a majority of the owners

of the abutting property, was constitutional. In such a case the power to make the improvement or to levy the tax is not vested in such property owners, but the provision is a mere restriction upon the exercise of a power which, when unrestrained, had doubtless often been exercised with great injustice to and oppression of the property owner.

"Section 5 of the act is also a restriction upon the exercise of his power. It provides that no ordinance for such an improvement shall be considered or passed by the City Council or Board of Trustees unless it shall have been recommended by the Board of Local Improvements. If this board has performed its duties it is fully informed of the necessity of the work, of the nature, character and cost of the improvement, and of the views and interests of those whose property is to be assessed to pay for it, before it makes its report and recommendation to the City Council or Board of Trustees. The corporate authorities could not act intelligently in such matter without first having obtained the information which, under the statute, it is the duty of the board to obtain before any ordinance can be adopted by the council. Preliminarily, the property owners have been notified and afforded a hearing. This opportunity for the property owners to be heard, as a preliminary step in the proceeding, is one of the important provisions of the act. Former statutes contained no similar provision.

"It is claimed, however, the council or board of trustees has no discretion under the statute, but must adopt the ordinance as framed and presented by the Board of Local Improvements. This is a misapprehension of the act. Section 34 contains the only provision which makes it the duty of the corporate authorities to adopt an ordinance providing for the improvement recommended by the board, and that is confined to cases where the owners of the greater part of

the property in any one or more contiguous blocks abutting on the street or public place to be improved shall petition for the improvement. That section provides, among other things, that after the hearing before the board, and after it has determined the nature and cost of the improvement, it shall prepare and transmit to the legislative,—that is, to the corporate authorities—'draft of an ordinance therefor, together with an estimate of cost, * * * and shall recommend the passage thereof, which recommendation shall be *prima facie* evidence that all the preliminary steps required by law have been taken; and thereupon it shall be the duty of such legislative body to pass an ordinance for the said improvement, and take the necessary steps to have the same carried into effect.' This provision does not make it the duty of the council to pass an ordinance providing for the improvement because the Board of Local Improvements has recommended it, but because, primarily, the owners of the abutting property have petitioned for it. Nor is it made the duty of the council to adopt the 'draft of an ordinance' prepared and presented by the board, but only 'to pass an ordinance for the said improvement.' Clearly, this provision of the statute does not vest in such board the power to make the improvement and levy a special assessment or a special tax to pay for it. There is no other section of the statute, so far as we have discovered, which provides what the council shall do when it has received the recommedation of the board and the ordinance which it has prepared, except that Section 11 requires that where the estimated cost of the improvement exceeds $100,000 the ordinance shall be refered to the appropriate committee, and, with the recommendation and estimates, published, with proceedings of the council, at least one week, before any action shall be taken thereon. True, as before said, Section 5 con-

tains the negative provision that no ordinance for any local improvement to be paid for by special assessment or special taxation shall be considered or passed unless first recommended by the Board of Local Improvements. But as we construe the statute the City Council or Board of Trustees, may, in its discretion, refuse to pass an ordinance submitted and recommended by the local board, notwithstanding it may be that it must pass an ordinance for the improvement where such improvement has been petitioned for by the requisite number of property owners.

"That it was not intended by the legislature to vest the power to make local improvements by assessment or special taxation in the board created by the act is further shown by the first section, where, following, in the main, the language of previous acts, as well as the constitution, which has been previously construed by this court, it is provided 'that the corporate authorities of cities, villages and corporated towns are hereby vested with the power to make such local improvements as are authorized by law by special assessment, or by special taxation of contiguous property, or by general taxation, or otherwise, as they shall by ordinance prescribe.' We think it is evident that it was not the purpose of the General Assembly to vest these boards with power to make local improvements and to levy special taxes and assessments to pay for them, but rather, to create a municipal agency to ascertain and determine questions of a preliminary character, which the corporate authorities may not be so well able to ascertain and determine, and which, when so determined, operate as restrictions upon the exercise of the great power over the property of the citizen which the corporate authorities of municipalities possessed. Whether these boards do or will subserve the purpose of their creation does not affect the validity of the statute.

> "We are of the opinion that the statute does not violate the provision of the constitution above set out, in the respect mentioned."

In view of this express decision of the Supreme Court of Illinois holding that the provision of the Constitution of Illinois providing that the power of making local improvements may be conferred on "corporate authorities", has not been violated by the Local Improvement Act of Illinois, it is unnecessary to review the Illinois cases cited by counsel for plaintiff in error in respect to who constitute "corporate authorities."

The rule is well settled in this court that the construction of the Constitution and laws of a State by its courts is, as a general rule, binding on the Federal courts.

> *Forsythe* v. *Hammond*, 166 U. S., 506, 518.
> *Merchant's and Manufacturer's Bank* v. *Penna.*, 167 U. S., 461.
> *Schaefer* v. *Werling*, 188 U. S., 516, 517.

In *Forsythe* v. *Hammond, supra*, the court said (p. 518, 519):

> "The construction by the courts of a state of its constitution and statutes is, as a general rule, binding on the Federal courts. We may think that the Supreme Court of a State has misconstrued its construction or its statutes, but we are not at liberty to therefore set aside its judgments. That court is the final arbiter as to such questions."

In the case of *Schaefer* v. *Werling, supra*, where it was expressly decided by this court that the construction placed by the highest courts of a State on a State statute providing for paving streets and dis-

tributing the assessment therefor is conclusive upon this court, the court said (p. 517):

> "The case involves the validity of a statute of Indiana known as the 'Barrett Law' enacted in 1889 * * *. We deem it sufficient to refer to the opinion in *Adams* v. *City of Shelbyville, supra*, in which the Supreme Court of Indiana closed an elaborate discussion of the various provisions of the law in these words: 'We, therefore, conclude that section three, Acts 1889, Sec. 4290, Burns 1894, must be construed as providing a rule of *prima facie* assessment in street and alley improvements which allotments by the city or town engineer under Section six of said Act of 1889, Sec. 4293, Burns, 1894, are subject to review and alteration by the Common Council and Board of Trustees under Sec. 7 of said Act of 1889 as amended, Acts of 1891, p. 324; Acts 1899, p. 64; Sec. 4294, Burns 1894, upon the basis of actual special benefits received by the improvement: And that under said Section 7 the Common Council of the city or Board of Trustees of an incorporated town have not only the power but it is their imperative duty, to adjust the assessments for street and alley improvements, under said act, to conform to the actual special benefits accruing to each of the abutting property owners.'
>
> Of course, the construction placed by the Supreme Court of a State upon its statutes is, in a case of this kind, conclusive upon this court. *Forsyth* v. *Hammond*, 166 U. S., 506, 518 [and cases cited.] And with that construction the following recently decided cases, in which the matter of street assessment was fully considered, sustained the decision of the state court upholding the validity of the law [citing cases]."

IV.

The construction of Sections 42 and 86 of the Local Improvement Act of Illinois, of June 14, 1897, which counsel for plaintiff in error contends, in his second point, are unconstitutional "because they interfere with the right of contract by fixing the rate of interest on assesments and improvement bonds at five per cent.", involves a local, and not a federal, question and the interpretation placed on said sections by the Supreme Court of Illinois is, therefore, binding on this court.

The pertinent parts of Sections 42 and 86 of the Local Improvement Act of Illinois are respectively as follows:

> "42. (DIVISION OF ASSESSMENT INTO INSTALLMENTS—PAYMENT OF INTEREST.) It shall be lawful to provide by the ordinance for any local improvement, any portion of the cost of which is to be defrayed by special assessment or special taxation, or by ordinance passed at any time before the confirmation of the assessment roll, that the aggregate amount assessed, and each individual assessment, and also the assessment against the municiaplity on account of property owned by the municipality and for public benefits, be divided into installments, not more than ten (10) in number: Provided, however, that any such special assessment or special tax levy for building sewers, subways or viaducts may in like manner be divided into not exceeding twenty (20) installments. In all cases such division shall be made so that all installments shall be equal in amount, except that

all fractional amounts shall be added to the first installment, so as to leave the remaining installments of the aggregate equal in amount and each a multiple of one hundred dollars ($100) * * *.

All installments shall bear interest as hereinafter provided until, paid, at the rate of five (5) per centum per annum. Interest on assessments shall begin to run from the date of the first voucher issued on account of work done as aforesaid. * * *

86. Bonds to Anticipate Installments of Assessment. For the purpose of anticipating the collection of the second and succeeding installments, provided for in this act, it shall be lawful for such city, village or town, to issue bonds, payable out of said installments, bearing interest at the rate of five per centum per annum, payable annually and signed by such officers as may be by ordinance prescribed; said bonds shall be issued in sums of one hundred dollars, or some multiple thereof, and shall be dated and draw interest from the date of the issuing of the same. Each bond shall state on its face out of which installment it is payable, and shall state, by number or other designation, the assessment to which such installment belongs. The principal of such bonds shall not exceed, in the aggregate, the amount of such deferred installments, and shall be divided into as many series as there are deferred installments. * * *"

From a consideration of these sections it is manifest that the only conclusion that can be reached is that they form part of the general scheme provided by the Local Improvement Act of Illinois for collecting this species of taxation known as special assessments; that they do not discriminate between persons or classes of persons; that they prescribe no new or unusual methods in the procedure for col-

lecting special assessments, but that they simply provide that the property owner shall pay a certain rate of interest on the installments of his assessment, and that the city shall pay a corresponding rate of interest on the improvement bonds which it may issue to the contractor in payment for the improvement; and that these provisions are only the usual and customary ones which are ordinarily contained in special assessment acts.

It is apparent, we submit, that there is nothing in these provisions which could be construed as depriving a person of his property without "due process of law" or in violation of the "law of the land." But, as we have stated, they are only part of the procedure to collect special assessments; and, therefore, their construction involves only a local, and not a Federal question, the determination of which by the Supreme Court of the State will be conclusive upon the Supreme Court of the United States.

The Supreme Court of Illinois in their opinion in the present case, set out in the Transcript of Record, pp. 32-34, and reported in 213 Illinois, 452, on this point, say (pp. 455-456):

> "It is next contended that sections 42 and 86 of the Local Improvement Act, in accordance with the terms of which, by the ordinance, the assessment was divided into installments and bonds to anticipate the payment of the deferred installments were provided for to be issued, is unconstitutional, on the ground that the legislature had no authority to fix the rate of interest which said installments and bonds should bear, at five per cent. No authority has been cited to sustain that position. It is, however, urged that the effect of said sections is to de-

prive the property owner of his property without due process of law, in this: that the rate of interest on the deferred installments and bonds cannot be fixed at a lower rate by the city than five per cent., and it is said that the city, if untrammeled by the statute, might be able to issue and negotiate the same at a lower rate than that fixed by the statute. We cannot agree with the view of appellant, but are of the opinion of the legislature had the right to fix the rate of interest which said deferred installments and bonds, when issued, should bear, and that those sections of the statute are not in conflict with the constitution."

In the subsequent case of *Gage* v. *City of Chicago*, 216 Ill., 107, 109, 110, the Supreme Court of Illinois in again deciding this precise question, say (pp. 109, 110):

"The argument in support of the second proposition is, that the act of the legislature arbitrarily fixing the rate of interest on the installments, and also on the bonds, at five per centum per annum interferes with and denies to the city, as the representatives of the property owners, the right to make its own contracts, and is unconstitutional because it interferes with the freedom of the citizens and with their constitutional right to make their own contracts, guaranteed to them by the constitution. The purpose of the legislation authorizing the division of an assessment into installments payable in the future is to secure to the property owner an extension of time in which to pay the assessment. The property holder has no fundamental or constitutional right to have the payment of the benefits conferred on his property by the improvement deferred until a future period. It was entirely for the determination of the legislature whether such privileges should be secured for the property owner. The

earlier statutes of the State contain no provision for the division of the special assessments into installments. In legislating to confer this right or privilege the law-making body was not dealing with any fundamental or constitutional right of the taxpayer, and could lawfully, in providing for the extension of the time of payment, arrange for the payment of interest at a specified rate. (*Hulbert* v. *City of Chicago*, 213 Ill., 452.) Whether a fixed rate should be specified or a maximum rate per cent. which not be exceeded be named, was for the consideration and determination of the legislature. The legislature does not infringe the personal right of any property holder by compelling him to pay interest absolutely, but said section 42, as adopted in 1897 and as amended in 1903, provides that any person may at any time pay the whole assessment against his property or may pay any installment thereof, and thus the payment of interest may be wholly avoided or avoided in part, as the property owner may elect. *Village of Wilmette* v. *People ex rel.*, 214 Ill., 107."

The above decisions, we submit, are conclusive upon this court.

It will be observed that in both opinions, in sustaining the validity of the sections in question, the Supreme Court of Illinois considered them solely in relation to the Constitution of Illinois, and not in respect to the Constitution of the United States.

In neither opinion does the Supreme Court of Illinois even intimate that they were called upon to consider the question from the standpoint of the Constitution of the United States. It is reasonable to assume, therefore, that that feature of the question was not presented to that court in either case.

And in the present case this inference is strengthened by the fact that the assignments of error in the Supreme Court of Illinois do not specifically set up or claim that these sections are in violation of the Constitution of the United States. We submit, therefore, that it is extremely doubtful whether this question was properly called to the attention of the Supreme Court of Illinois so that it could be reviewed by this court.

But since it may be held that the federal question was properly presented in the assignments of errors in the Supreme Court of Illinois, and that, although the court decided the question only in respect to the Constitution of Illinois nevertheless that decision necessarily involved a Federal question, we will discuss the question on its merits.

V.

Sections 42 and 86 of the Local Improvement Act of Illinois of June 14, 1897, which counsel for plaintiff in error in his second contention claims are unconstitutional "because they interfere with right of contract by fixing the rate of interest on assessments and improvement bonds at five per cent.," confer no contractual rights whatever on the property owner, and, therefore, necessarily do not impair or abridge any such rights. But we submit that even if they did confer certain contractual rights upon the property owner, they would not impair such rights in providing for a fixed rate of

interest on installments of special assessments and special assessment bonds.

We submit, *first*, that Sections 42 and 86 of the Local Improvement Act of Illinois create no contract rights whatever in respect to a property owner; and, *second*, that granting they do create a contract in which the property owner has rights, they do not impair those rights in violation of either the Constitution of Illinois or of the United States.

First. That the sections in question do not confer any contractual rights on a property owner seems so clear to us that in our opinion argument is unnecessary. The language of the sections is not ambiguous or obscure, and a casual reading of them is sufficient to show that no contractual rights whatever are conferred on property owners in respect to the payment of interest on installments of special assessments and improvement bonds. Certainly it will not be contended that the obligation on the part of the property owner to pay the installments of the assessments and the interest thereon provided for by Section 42, creates a contract between him and the municipality; for, since special assessments are a species of taxation, this duty or obligation on the part of the property owner is nothing more than that which exists in respect to the payment of any other species of taxes or of general taxes.

And it is plain that Section 86 does not expressly or impliedly confer any contractual rights on the property owner in respect to the improvement bonds which the municipality is authorized to issue, and on which it may prescribe a rate of interest

at five per cent. Section 86 does not even make it mandatory on the part of the municipality to issue improvement bonds in payment of work, but leaves it entirely discretionary with the municipality whether such bonds may be issued. Even if it should be contended that a contract arises between a municipality and the bondholders when the bonds are issued, can it be reasonably maintained that the property owner is a party to such contract and has rights therein which are impaired because the statute prescribes a fixed rate of interest on such bonds?

Without pursuing further our argument on this point, we submit that it is manifest that the sections in question do not confer any contract rights on a property owner—certainly not expressly, nor even by the remotest implication or the most refined and technical reasoning. Whether the Legislature should have conferred such rights on the property owner is a matter entirely of legislative policy and expediency, which is not involved here. It seems to us that the logical complaint of counsel should be, not that the contractual rights of plaintiff in error are impaired, but that the Legislature has not conferred such rights.

Second. Assuming, for the sake of argument, that in some way unknown to us, the sections in question confer certain contractual rights on the plaintiff in error, we submit that, since the making of local improvements by special assessments is purely a statutory proceeding in respect to which the property owner derives only such rights as are granted and independent of which he has no rights

whatever, if the contention of counsel for plaintiff in error is true, it would follow that the statute which confers certain contractual rights on the property owners at the same time and by its own terms deprives him of those rights. But such a contention involves a manifest contradiction.

The only position for counsel for plaintiff in error to assume, therefore, is the impossible one that the contractual rights of the plaintiff in error which it is claimed are impaired by the sections in question, are *inherent rights* which exist independent of the Local Improvement Act of Illinois. In other words, counsel is forced to maintain that plaintiff in error possesses certain rights of contract in respect to the installments of special assessments and improvement bonds and the rate of interest thereon, which are independent of the statute, and which are guaranteed by that general clause of the Constitution of Illinois, and the Constitution of the United States which provides, in substance, that no person shall be deprived of life, liberty or property without due process of law. Such a contention amounts to an absurdity, when it is borne in mind that the scheme of making local improvements by special assessment is entirely statutory, and that the only rights which a property owner possesses in respect thereto are derived from the statute. But counsel has, nevertheless, asserted this proposition, and in support of it cites the following cases:

Ritchie v. *People*, 155 Ill., 198; *McChesney* v. *People*, 200 Ill., 140; *Adams* v. *Brennan*, 177 Ill., 194;

Millet v. *People*, 117 Ill., 294; *Frorer* v. *People*, 141 Ill., 171; *Bailey* v. *People*, 190 Ill., 28.

It is needless to say that none of these cases announces such a doctrine as contended for by counsel. In *Ritchie* v. *The People*, *supra*, and *McChesney* v. *The People*, *supra*, the right of contract referred to was that which exists between employer and employee. The case of *Adams* v. *Brennan*, *supra*, involved the validity of a contract between the Board of Education of the City of Chicago and a contractor, for the building of a school house. The cases of *Bailey* v. *The People*, *supra*, and *Millett* v. *The People*, *supra*, hold that the legislature cannot pass statutes which are of a discriminative character.

We further submit that the question under discussion may be considered from another standpoint, and that is the legislative power generally in respect to interest. Counsel claims that certain contractual rights of the plaintiff in error are impaired by reason of the fact that the sections in question fix the rate of interest at five per cent., and do not leave the municipality free to take advantage of a possible lower rate of interest which the market might afford. But since interest is solely a creature of statute,

Fowler v. *Harts*, 149 Ill., 582, 597.

Ins. Co. v. *Refrig. Co.*, 162 Ill., 322, 323.

City of Chicago v. *Allcock*, 86 Ill., 384.

I. C. R. R. Co. v. *Cobb, Blaisdell & Co.*, 72 Ill., 148, 152,

it is difficult to perceive on what theory it could be demonstrated that a property owner could acquire any positive rights to interest on special assessments and improvement bonds; still more difficult to understand how such rights could partake of contractual rights; and further still, equally puzzling to comprehend how such rights are guaranteed by the Constitution of the United States.

If we have correctly stated the rule that there are no common-law rights in interest, but that it is a subject over which the legislature has entire control, how can it be reasonably or intelligently argued by counsel for plaintiff in error that in fixing the rate of interest on installments of special assessments and assessment bonds, the Legislature of Illinois has impaired certain constitutional rights of plaintiff in error. He has only such rights in respect to interest which the statute gives him. And the legislature could either grant or withhold this right as it might deem expedient.

In conclusion, we submit that from whatever view the contention of counsel for plaintiff in error is considered, it appears absolutely unsound and unreasonable.

Respectfully submitted,

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